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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

E.F., et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No.
)	8:14-cv-00455-CJC-RNB
NEWPORT MESA UNIFIED SCHOOL)	
DISTRICT, et al.,)	
)	
Defendants.)	
)	

REPORTER'S TRANSCRIPT OF
MOTION HEARING
MONDAY, JUNE 22, 2015
9:02 A.M.
SANTA ANA, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
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1 **SANTA ANA, CALIFORNIA; MONDAY, JUNE 22, 2015**

2 **9:02 A.M.**

3 - - -

4 THE COURTROOM DEPUTY: Calling Item No. 1,
09:02AM 5 SACV-14-455, E.F., et al. versus Newport Mesa Unified School
6 District, et al.

7 Counsel, please state your appearances.

8 MS. LOYER: Kathleen Loyer, spelled L-o-y-e-r,
9 appearing for the plaintiffs.

09:03AM 10 THE COURT: Hello, Ms. Loyer.

11 MS. LOYER: Good morning. And this is my intern
12 clerk for the summer, Phillip Kunka, spelled K-u-n-k-a. I'm
13 sorry. I just wanted to let you know who's here, Your Honor.

14 MR. KUNKA: Thank you.

09:03AM 15 THE COURT: I appreciate that.

16 You're welcome, sir.

17 MR. HARBOTTLE: Good morning, Your Honor. Dan
18 Harbottle, H-a-r-b-o-t-t-l-e, for Newport Mesa School District.

19 THE COURT: Hello, Mr. Harbottle.

09:03AM 20 MR. HARBOTTLE: Good morning.

21 THE COURT: Well, I've received all the position
22 papers and the ALJ's decision, and I have a -- I guess a
23 general softball question for you, Ms. Loyer. Tell me, what do
24 you think is the most efficient aspect of the placement and
09:03AM 25 education that the district provided to E.F.?

1 MS. LOYER: Well, Your Honor, I think it's the lack
2 of understanding, his need for functional communication. And
3 as I detailed in my brief, I -- do you want me to stand,
4 Your Honor? I'm sorry.

09:04AM 5 THE COURT: Thank you. It probably would be easier
6 for you so you're not bending your back. Why don't you go to
7 the lectern, and so it's easier for Debbie, our court reporter.
8 It's a beautiful courtroom, at least I think it's a beautiful
9 courtroom, but listen, can you hear me when I'm over here? So
09:04AM 10 you can imagine that's why we have to speak into the
11 microphone.

12 MS. LOYER: Okay. That is better. Thank you,
13 Your Honor.

14 I think it's -- the foundational thing to teach children
09:04AM 15 is communication. And we tried to lay it out in our briefs and
16 responses that this seemed to not quite resonate with the ALJ
17 who heard the case. I think the factor -- his cognitive
18 ability question played into that. I think that there was
19 evidence in the record and in the testimony that only partial
09:05AM 20 scores could be achieved because of the lack of communication
21 and his ability to participate in the -- the protocols that are
22 administered. And so those two things to me are the main point
23 of this case.

24 And it appears that they were minimized by the ALJ. And
09:05AM 25 we have these pages and pages, but even in finding that the

1 district was remiss for one year, I just feel that given the
2 presentation of everybody involved, she missed the point by
3 minimizing it.

4 And so if we look at it from that point of view, the best
09:05AM 5 analogy I think I can give the Court, if you ever saw the movie
6 "*The Miracle Worker*" about Helen Keller, there's that one scene
7 where they're at the pump and she puts together the word
8 "water," "wa" with "water," and that's what opened her door.
9 And look what they found when they opened the door. E.F.
09:06AM 10 hasn't been given that opportunity up until that point.

11 And the testing they're relying on is not reliable by
12 their own statements that they were incomplete and unreliable.
13 And it appears that they kind of latched onto that because that
14 was an easy way to explain why he wasn't progressing.

09:06AM 15 THE COURT: Tell me what you think, Ms. Loyer, they
16 should have done in terms of functional communication. What
17 specifically should have been done that wasn't?

18 MS. LOYER: I think that when he failed to
19 progress -- let's just stop for a minute and give you some
09:06AM 20 foundation on that. One of the things that came up in the
21 hearing, but not necessarily before the hearing, was his lack
22 of readiness skills. And I think if you really read the
23 documents presented at the underlying administrative hearing as
24 well as the arguments we presented, they demonstrated that he
09:07AM 25 met goals that spoke just to that -- the eye contact, some

1 minimal verbal behavior -- but they didn't take the next step,
2 and that's where the AT comes in.

3 If we were back in 1980, it would be a different case, but
4 we were in an age back then, even before I was involved with
09:07AM 5 the family and their case, assistive communication devices were
6 there. As a matter of fact, when we finally got to that with
7 the district, they had one in stock, which is why we switched
8 to the iTouch, because they said they could have that
9 immediately, where it would take six weeks to order what was
09:07AM 10 recommended.

11 And so it wasn't a lack of knowledge on the district's
12 part about this type of technology, it was their lack of giving
13 it a try with him. PECS wasn't working by their own testimony.
14 Signing wasn't working. And so we have very limited choices.
09:08AM 15 He's a very complicated autism case. He's complex. He had
16 fine motor issues as well as communication issues. And so that
17 makes certain things harder.

18 And the degree of his -- this communication disability was
19 pretty severe. And we're not trying to minimize that, but the
09:08AM 20 key to this child was AT. And as I noted in my pleading, his
21 father testified that when they went out and bought it and gave
22 it to him, he took to it like a duck to water.

23 And so the analogy, going back to the Helen Keller
24 analogy, I'm not saying that he's going to start speaking
09:08AM 25 tomorrow, because he has an assistive technology device, but he

1 can start -- he did start communicating. And so that, to me,
2 is the biggest piece of evidence to show that this was a
3 deficit in his education program from when he entered
4 preschool.

09:09AM 5 And Ms. Cottier, the specialist, she's a licensed speech
6 and language path and a specialist in assistive technology, the
7 full range, from PECS to high tech. And when she was on the
8 stand, we asked her how young can these devices be introduced,
9 and she said that she introduced them as young as three years
09:09AM 10 old. And so our statute doesn't go back that far, but the
11 concept that he needed it and it was something that the
12 district claimed to have highly qualified people looking at
13 him, it wasn't until the testimony at the trial that they
14 brought up the fact that he had to show a certain level of
09:09AM 15 progress before they would even test him. And that's just not
16 the protocol. It's just not. And I think Ms. Cottier provided
17 testimony to that effect.

18 And so I'm focusing on the one issue we won, but it was so
19 minimized by this ALJ, she -- it was able to find that that was
09:10AM 20 a deficit, but didn't even find the IEPs for that year's
21 deficit, and there were no goals for AT. And so it's just
22 inconsistent. And the only thing I feel is the best way to
23 kind of make a global statement about it is she didn't
24 understand the full complexity of the case. I think she had
09:10AM 25 plenty of testimony, and her finding Dr. Hughes as unbelievable

1 is astounding. She's internationally known. She testified for
2 seven hours without a hiccup, and she gave her no credibility.
3 I find that just astounding given her stature in the community
4 of autism.

09:10AM 5 She trains people all over the world, and so I don't -- I
6 think that if she had understood the importance and if she had
7 listened appropriately and gave some credence to Dr. Hughes, we
8 wouldn't be here today. I hope that answers your question.

9 THE COURT: No, you are. So tell me what assistive
09:11AM 10 technology or other services or assistance you think the
11 district should do and the ALJ didn't say was necessary.

12 MS. LOYER: Well, the limited amount of services
13 from a properly trained speech and language path who would be
14 overseeing any assistive technology, because it's like an
09:11AM 15 offspring of speech and language, and I think her remedy was
16 seven hours and limited to training. We felt and Ms. Cottier
17 testified, to some degree, because she had the credentials to
18 do it, that he needed more. Especially at his age, we have to
19 understand that there was a very important developmental window
09:12AM 20 that was missed when they were trying things and failing and
21 not moving on up the food chain, so to speak, of communication
22 intervention.

23 And so we think he needs a very enhanced program. We
24 think he needs a one-on-one trained aide to be able to
09:12AM 25 facilitate communication. It's his voice, and he still is

1 learning how to use it. And so it involves at least initially
2 some level of intensity. And that wasn't offered and nor was
3 it given as a remedy.

4 The other aspect goes to Dr. Hughes and her testimony and
09:12AM 5 her team's assessment. One of the things she talked about on
6 the stand was the concept of verbal behavior. And that gets --
7 I'm not an expert, so I'm just going to give you a little bit
8 of an outline that has to do initially with eye contact and
9 turning when your name is called. That's verbal behavior. But
09:13AM 10 it crosses into a more complicated concept when you're trying
11 to facilitate social communication. And so social
12 communication is part of what you need in order to be educated
13 in this system we're in. And so that type of intervention is
14 typically behaviorally based, because it's behavior.

09:13AM 15 And typically the standard of care in the community is
16 that kids with his diagnosis, that profile, taking into
17 consideration, of course, his unique needs, they receive a
18 certain level of intensive ABA, that's applied behavioral
19 analysis treatment. He never really got that at an intensive
09:13AM 20 level. And when the family brought Dr. Hughes in, it was to
21 explore that.

22 Everything in the classroom he was in at the time, even
23 his one-on-one services that is supposed to mean individual,
24 him and the therapist, was done in the classroom. And to me,
09:14AM 25 that's a violation of the intent of the law. I mean, how can

1 you say individual takes place in a classroom where other
2 people and other children are there with varying degrees of
3 distractibility?

4 And then you go to E.F.'s unique situation. We have just
09:14AM 5 cited several cites in his IEP documents. His parents
6 testified to it. The service providers testified to it. He
7 doesn't do well in groups. Yet none of the services were
8 provided in the one-on-one even though that was on the service
9 plan. And the ALJ didn't seem to get that either.

09:14AM 10 One of the primary things this child struggles with is
11 that distractibility, keeping his focus. He had a goal where
12 he could pay attention for eight seconds. That's a pretty
13 significant deficit. And so how can he receive appropriate
14 services when all of the services are pushed in and you have
09:15AM 15 all that commotion going on? It made no sense.

16 I think that that concept is what we asked for in our
17 remedy. We feel that Dr. Hughes made very good
18 recommendations. Would that program be given to him in
19 perpetuity? No. But he needs that intensity, not only to get
09:15AM 20 him where we think he can go or at least to find out where he
21 can go, but to make up for all the years he didn't get what he
22 needed when he was in the most open developmental window of
23 learning communication and being socialized.

24 I think that we tried to outline it as best we could. I
09:15AM 25 don't know that the district at this point in time or at that

1 point in time was equipped because of the change in their
2 programming and the way they handled their whole autism
3 program. Their adoption of a new format for E.F., that just
4 wasn't working for him, yet he was stuck in it because that's
09:16AM 5 what they had.

6 THE COURT: Okay. Well, thank you.

7 MS. LOYER: Thank you, Your Honor.

8 THE COURT: I'll hear from Mr. Harbottle and give
9 you a chance to respond to it.

09:16AM 10 MR. HARBOTTLE: Thank you, Your Honor.

11 As you know from your handling these cases before, this is
12 not a de novo review. This particular case was particularly
13 long and involved many, many witnesses. There were seven days
14 of hearing as counsel said. I think Dr. Hughes was on the
09:16AM 15 stand for seven hours. Others were on the stand for equivalent
16 lengths of time.

17 And I think that the first thing that needs to be said is
18 that the Court needs to determine whether the decision was
19 thorough and careful. And if it is thorough and careful, which
09:17AM 20 I believe it is, then significant deference needs to be given
21 to it on the basis that this judge listened to those witnesses.

22 In fact, she was active in questioning witnesses, which is
23 sort of one of the substandards for whether a decision is
24 thorough and careful. And she was inquisitive. She wanted to
09:17AM 25 know the answers to these questions.

1 I also think it's important -- one thing that the judge
2 began the case with in her decision -- I'm going to quote this
3 briefly -- she said:

4 "The crux of this case is whether students
09:17AM 5 acknowledge slow progress is due to his
6 disabilities that do not permit him to progress at
7 a more rapid rate or due to failures by the
8 district to adequately access and address all
9 students' unique needs."

09:17AM 10 That's at AR 1273. That is the basic crux of the
11 situation. And one thing counsel said at the end of her
12 presentation is right on target, he did have a goal that he
13 needed to maintain attention for seven seconds, eight seconds.
14 There were two, one for seven and then one for eight seconds.
09:18AM 15 That speaks to his level of functioning at the time the IEPs
16 were developed and assessments were done.

17 As a functional matter, an individual who cannot sustain
18 attention for more than eight seconds needs particularly
19 careful services, and the Court -- the judge, the ALJ clearly
09:18AM 20 got the message that this student was operating at his level of
21 functioning throughout the entire period.

22 THE COURT: Mr. Harbottle, as I get it, though,
23 Ms. Loyer believes that he had serious functional communication
24 problems. And they had an expert, Dr. Hughes, who says, "Okay.
09:18AM 25 Given where we're at and the problems E.F. has, you need to

1 give these services much greater remedial programs than what
2 the ALJ found." What's your response to that?

3 MR. HARBOTTLE: I have two immediate responses. One
4 is that it came out clearly in the evidence that he was getting
09:19AM 5 individual speech therapy for about a year and a half, paid for
6 by the parents, and Mr. Fulsang testified, and it was
7 corroborated by others, that he terminated that private speech
8 service -- those private speech services that were given in the
9 home or in the clinic on the basis that they were not having
09:19AM 10 any effect. In his words, it didn't pay off.

11 According to the judge, she pointed out that he had tried
12 to downplay that during the course of the hearing. But, in
13 fact, it was true, that an enhanced level of service, it's not
14 a quantitative measure all the time, it's qualitative. He
09:19AM 15 employed a private speech provider to ensure that he got as
16 much as the family thought they needed despite the district's
17 offer of less.

18 The second thing I want to point out is the district in
19 the May 8, 2011 IEP doubled the amount of speech services that
09:20AM 20 were being offered in a group setting. They were offering one
21 times 30 a week. They doubled it to two times 30 a week. And
22 the judge also points out that the family, without explanation,
23 never accepted this doubling of speech services. That would
24 have been functional communication speech and language
09:20AM 25 services. Never accepted them. You know, that's a decision

1 that the family made.

2 But the district was operating on the assumption that it
3 was -- not just the assumption, because it did a full-blown
4 triennial assessment between November or December and February
09:20AM 5 2011 and determined his level of functioning at that point.
6 And we did the IEP, added some goals, deleted some goals,
7 modified the structure of the IEP to address those needs.

8 I also want to point out that there were numerous -- if
9 you read the decision carefully, there were maybe a dozen areas
09:21AM 10 in which the ALJ rightly determines or rightly states that no
11 evidence was presented. Ms. Loyer started off with her
12 critique of the cognition testing that the district's assessor
13 did. No one ever critiqued that. It wasn't part of the
14 evidence. Dr. Hughes nor Ms. Cottier ever critiqued the
09:21AM 15 district's assessment of students. Simply saying the cognitive
16 testing is invalid is not evidence nor that the goals weren't
17 appropriate. There was no evidence on that.

18 In terms of progress, in functional communication and
19 others, all you need to do -- there's nine IEP's in this case.
09:21AM 20 That's unusual. There's usually -- over the course of a
21 three-year period, there's usually three or four. There's nine
22 here. If you go to the trouble to set down each goal and show
23 what happened with it, you'll find that the vast majority were
24 met or there was significant progress on them as they went
09:22AM 25 through.

1 And goals, as you know, are the fundamental piece of an
2 IEP. Those drive the services. Those drive the placement for
3 the student. And in each of the cases, if you go through each
4 of those nine IEPs and the goal progress reports that are also
09:22AM 5 in evidence, you'll see that he was either meeting or making
6 significant progress on his goals. That evidence was not
7 challenged at the hearing.

8 It's also important to point out the character of the
9 classroom. Speech language services, the way related services
09:22AM 10 like speech language function in an IEP are to support the
11 placement. In this case, E.F. had an ABA-based classroom that
12 was language rich, that had sensory integration applications
13 built in, that had visual integration applications built in.
14 It had very few students, very many adults. I think the ratio
09:22AM 15 was almost one to one or two to one at some point. That's part
16 of the reason that the services can occur in the classroom,
17 because it's highly structured.

18 The judge said many times that it was a language-rich
19 environment and that was part of the reason that additional
09:23AM 20 individual or group service did not need to be provided.
21 Because as counsel mentioned, Newport Mesa has a highly
22 sophisticated autism-specific program for kids like E.F. He is
23 on the low end. He is on the severe end, and they have
24 classrooms and support directly geared to kids that function at
09:23AM 25 his level.

1 So in terms of the remedy, I think counsel was right, she
2 focused on the area -- the single area that the judge found we
3 had been deficient in. And we didn't appeal that finding. We
4 read the decision and found that it was thorough and careful.
09:24AM 5 And while we disagreed with her perspective on that point,
6 there was a lot of evidence that was contrary to that. But
7 that's not reversible error, just the fact that there's
8 differences of opinion and differences of perspective.

9 There was evidence that he was not ready for an iPad or
09:24AM 10 iTouch in the classroom. He had to develop functional
11 communication skills in advance of that. The judge felt we
12 were wrong about that and we didn't appeal that because we felt
13 that overall the decision was thorough and careful.

14 And I guess the last thing I'll say, unless you have any
09:24AM 15 more questions for me, is that the Court -- the judge, I think,
16 took extra pains in this decision to look at what the law
17 required. And one of the last things she said in her decision
18 was the test about -- the test of whether an IEP is appropriate
19 is whether, taken in its entirety, it is reasonably calculated
09:25AM 20 to enable a particular child to garner educational benefit.

21 This record is just chockful of evidence that he was
22 making meaningful progress on his goals and otherwise. There's
23 lots and lots of testimony from his teachers about the progress
24 he was making in the classrooms, and there's documented
09:25AM 25 evidence of systematic progress throughout the course of the

1 three years.

2 THE COURT: Thank you.

3 MR. HARBOTTLE: Thank you.

4 THE COURT: Ms. Loyer.

09:25AM 5 MS. LOYER: Yes.

6 THE COURT: Would you like to respond?

7 MS. LOYER: Yes, I would, Your Honor. Thank you.

8 Well, obviously we have a difference of opinion. I think
9 that I'd like to first address the comments about the dad and
09:25AM 10 the private service provider. That did come up. There is
11 testimony, and we did address it in our brief. The private
12 service provider was working with E.F. on his oral motor
13 skills, and that's all. And it was she that advised the
14 parents to go to the IEP team to look at assistive technology.

09:26AM 15 And so she -- to use what the dad said, they got what they
16 could out of that. That wasn't going anywhere further than
17 what it was at the time. And she was not an AT specialist.
18 And so she said, "That's beyond my scope. I think he would
19 benefit from it, but you need to talk to the IEP team," and
09:26AM 20 they did. And the IEP team sat on their hands. That's the
21 thing that we won, because the testimony clarified what was
22 going on with the private service provider.

23 She didn't testify because we chose not to focus on the
24 individual aspect that she was working on. We felt --
09:27AM 25 obviously the parents felt that he needed that. But they made

1 the choice to not go after the district for the oral motor
2 training. They went and did that on their own. And so rather
3 than complicate what we thought was the core issue, we tried to
4 streamline our presentation as to what we were looking for and
09:27AM 5 why. And it had to do with functional communication and the
6 misconception that the team had about his cognitive abilities.

7 And we strongly disagree with counsel's characterization
8 that nothing was presented. We presented the documents the
9 district generated, their assessment reports, where these
09:27AM 10 numbers were reported and either not commented on or commented
11 on. And when he was first tested in 2009, his standard score
12 was 79. Now that's below the 80 mark for having deficiencies.
13 But it said in there all these scores should be viewed with
14 caution because the entire protocol could not be administered.

09:28AM 15 The second round of testing that counsel referred to, they
16 only did one of the subtests, and it's in their record. So I
17 don't know how we could challenge evidence that we put in the
18 record. It was accepted, and it's explained there. We
19 referred to it in our brief. And they came up with a below 50
09:28AM 20 and ran with it. And so we feel it was an assumption that they
21 easily validated with still faulty testing.

22 And that's where Dr. Hughes' testimony comes in, that
23 these kids, when they have that severity of communication
24 problems and autism, they're very hard to test. And so you
09:28AM 25 can't get a definitive number until you approach some level of

1 functional communication to be able to administer the
2 protocols. And the adaptive skills, the alternative testing
3 they do is also impacted with a child as severe as him. And so
4 even alternative testing is viewed with caution.

09:29AM 5 To say that a child has to have functional communication,
6 to get access to functional communication, I've never heard
7 that before in any of the research I've read and in none of the
8 case law I've read, and the professionals that are tops in the
9 field out there have never said, "You have to have it to get
09:29AM 10 it." So I just don't even understand that theory that they put
11 out there.

12 And the quote that counsel gave as to was the program
13 reasonably calculated for that particular child, I think it
14 wasn't, and I think we proved it wasn't. The problem is, is
09:29AM 15 the evidence presented was not properly analyzed, was not
16 scrutinized or was not understood.

17 Yes, the judge was very active, and that can be a real
18 plus. I like it when the ALJs get involved with the testimony,
19 but it also has -- there's another side to that coin. When you
09:30AM 20 have a judge that's that active, it seems they might be having
21 a problem getting their head around it. And it's not a
22 personal criticism of the judge, it's the -- this is a
23 complicated case. It really is. As counsel said, there are a
24 lot of things in issue, and which is why we took the strategy
09:30AM 25 of trying to focus in on the two things we thought were the

1 problem.

2 I think that the fact that there's so much emphasis put on
3 these goals when -- if you have something missing from a
4 child's IEP, a service, his AT being what's at issue and the
09:30AM 5 individual -- the proper administration of individual services,
6 then I think it follows that there's an absence of goals, and
7 the IEP shows that. There were no goals directed towards that.
8 And so that is a logical conclusion when you find that there is
9 something missing from the child's program. And so, yes, we
09:31AM 10 could have put testimony going through nine IEPs and spend
11 another five days in trial, but we felt we proved the most
12 significant thing for this child, and yet it was treated as
13 almost insignificant.

14 How an issue is numbered and placed -- and by the way, the
09:31AM 15 judge decided how that was going to be placed in her prehearing
16 statement -- should not denote the importance of the issue.
17 We're not required to say, "Okay, this is my No. 1 issue and
18 pay attention really to this one." We lay it all out. That's
19 our obligation, and that's my ethical obligation for my client
09:32AM 20 is to point out all the legally arguably deficits.

21 And it should -- I should think that given the magnitude
22 of all the experts we had involved in this, that that
23 conclusion that we came to, and even that the judge came to
24 that it was a deficit would have been received differently. I
09:32AM 25 mean, I have quotes from several educators -- I used some of

1 them in the documents that I submitted to the Court as to how
2 important this is, communication.

3 And you can have the most enhanced classroom in the
4 building, but if that child can't access it, it's nothing to
09:32AM 5 that child. And Dr. Hughes testified to that. That was one of
6 my opening remarks on Page 11 of my pleading. I think that we
7 just missed the point. It's like putting a book in front of
8 him and saying, "Well, sooner or later he'll learn to read."
9 That isn't how it works.

09:33AM 10 Subsequent to this, I think there's a good shot that he is
11 going to learn how to read. Given the kind of program, you see
12 the kind of progress that he can and will make. But the book
13 is -- you know, his story is not told yet. He's got several
14 years to make up for all these deficits. But the progress he's
09:33AM 15 showing is demonstrative, that cracking that nut of
16 communication is really what needed to be done.

17 And it's something that even the district's trainers, that
18 they testified that Autism Partnership is -- was the people who
19 trained their people. And Autism Partnership, it goes against
09:33AM 20 their philosophies as to how these programs are supposed to
21 run. And so I don't want to get too in the weeds with this,
22 but I do think that obviously today we're going to -- we're
23 trying to strengthen our positions, but I just can't get by the
24 past -- or past the issue of how important communication is.
09:34AM 25 And I feel like E.F. was kind of sidelined. They made this

1 decision, that eight-second goal was good enough, but yet he
2 could demonstrate much, much longer. And it's in the record,
3 attention for preferred items.

4 For example, he'll work as much as 15, 20 minutes at a
09:34AM 5 time on puzzles. Puzzles is one of the things he really
6 enjoyed. So I think that information given to these highly
7 qualified people demonstrated he can maintain attention.

8 Now preferred items, that's prestandard for any kid. What
9 they like to do, they're going to do more. But it's also
09:34AM 10 indicative of his capabilities if they can figure out how to
11 teach through that strength and not use methods that aren't
12 working. And that's where we're coming from, is they claim
13 great progress based on the goals they set and the baselines
14 they set when they didn't properly look at him. And so I can
09:35AM 15 see where they claim met.

16 But, for example, when a child meets a goal that's only
17 set at 50 percent, that's as good as chance. And 60 percent
18 isn't much better than chance, and Dr. Hughes did address that.
19 And so I just think that we're not going to get any concessions
09:35AM 20 from anybody today, but I think that it's a problem that I
21 think permeates the system, to be honest, Your Honor.

22 These are tough kids, and they're labor intensive. But so
23 many of them -- Autism Partnership boasts that when they do
24 that intensive intervention for communication, they have a 90
09:35AM 25 percent success rate. I was astounded when I heard that. And

1 I heard it from one of the people that runs the office that the
2 district is contracted with. And so I just think they gave it
3 their best shot, and they think it was their best shot, but it
4 wasn't. Not for this child.

09:36AM 5 And I understand the law says that you don't get the best,
6 you just get basic floor of opportunity. But if you have a
7 child who is -- was eight when the trial happened, who has
8 absolutely no functional communication to be able to educate,
9 couldn't write or spell his own name, I think that maybe we
09:36AM 10 needed to look at a different methodology.

11 He had his own little language his parents worked out with
12 him, and around them he could understand. And that showed a
13 definite intent to communicate. And the idea with a child this
14 hard to intervene, we concede he's a difficult case, you have
09:36AM 15 to kind of step out of the box and not put him in that
16 one-size-fits-all program.

17 I think, again, pointing out -- I'm repeating myself, but
18 I really think it's important to understand as you consider
19 this case, is the idea that Dr. Hughes said -- when she said,
09:37AM 20 "You can have the most enhanced environment possible, but if
21 the child can't access it, then it's the wrong environment."
22 Thank you, Your Honor.

23 THE COURT: Thank you.

24 Would you like a brief rebuttal? Last word.

09:37AM 25 MR. HARBOTTLE: Yeah, very brief, Your Honor. The

1 child E.F. was accessing this. This is -- the frustration here
2 for us is that the evidence says one thing, and the rhetoric
3 says something else.

4 This judge, I've read maybe hundreds of these OAH
09:37AM 5 decisions, and this is one of the more thorough and careful
6 I've ever seen. Plus the evidence, it's just -- it's virtually
7 indisputable that this student was making progress commensurate
8 with his abilities.

9 I would urge you to look at the number of areas of --
09:38AM 10 pointed out in the OAH decision where evidence was not
11 submitted by the student. And I would urge you to look really
12 carefully at this open book of documentary evidence that the
13 student was progressing. And maybe more importantly or at
14 least equally importantly, over the course of this three-year
09:38AM 15 period, this was one of the most proactive IEP teams and one of
16 the most highly qualified IEP teams that I've seen.

17 Their resumes are all on the record. They were deemed
18 highly qualified by the ALJ, their testimony was deemed
19 credible in every respect except for the single one of the ATs,
09:39AM 20 the delay in the AT. And this is an excellent record showing
21 meaningful educational progress. Not just us telling you now
22 or telling the ALJ now that he was making progress, this is
23 documented along the way contemporaneously with the efforts
24 made by the district. That's all I have.

09:39AM 25 THE COURT: Thank you.

1 I must say I appreciate the arguments on both sides. It's
2 very sad to me when you hear about an innocent child having a
3 severe disability. And I think we all agree that we need to
4 provide the necessary services, care, placement, and education
09:39AM 5 to E.F. So I recognize the difficulty of this case, and I do,
6 again, appreciate your arguments on both sides. And I'll try
7 to get a decision out shortly.

8 MS. LOYER: Thank you, Your Honor.

9 MR. HARBOTTLE: Thank you, Your Honor.

09:40AM 10 THE COURTROOM DEPUTY: All rise.

11 **(Proceedings concluded at 9:39 a.m.)**

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COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME
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Date: October 13, 2015

/S/ DEBBIE HINO-SPAAN_

*Debbie Hino-Spaan, CSR No. 7953
Federal Official Court Reporter*